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Attorneys for the United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CLAYTON BLEHM, dba FDC INVESTMENTS, INC.	Case No. 08-CV-1358-BTM-NLS
Plaintiff,	DEFENDANT BETSY MCINTYRE'S NOTICE OF MOTION AND MOTION TO DISMISS
v.	
BETSY MCINTYRE, an individual;	Removed from San Diego County, California Superior Court Case No. 37-2008-00084761-CU-FR-CTL
QUICKSILVER, INC., a Delaware Corporation;	
and DOES 1-50, inclusive,	Date: October 17, 2008 Time: 11:00 a.m. Place: Courtroom 15
Defendants.	*Per Chambers, No Oral Argument Unless Requested by the Court*

Please take notice that the named Defendant, Betsy McIntyre, by counsel undersigned, will bring the above-captioned motion on for hearing before the Honorable United States District Court Judge Barry T. Moskowitz in Courtroom 15 of the United States Courthouse at 940 Front Street, San Diego, California on October 17, 2008, at 11:00 a.m. or as soon thereafter as counsel may be heard.

Although stated as an action for damages against an Internal Revenue Service ("IRS") employee purportedly acting outside of the scope of her official duties, the action is actually against the United States and purports to challenge an IRS tax determination. Plaintiff's claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(5) because the Plaintiff has failed to serve a summons and complaint upon Ms. McIntyre (the named defendant) and the United States (the proper party defendant). Plaintiff's claims should also be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) as Plaintiff alleges no applicable waiver of sovereign immunity. Finally, Plaintiff's claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted as Plaintiff has no valid claim for damages in tort or arising under the Constitution.

A Memorandum of Points and Authorities in Support of the Defendant's Motion to Dismiss is submitted herewith.

Wherefore, the United States respectfully requests that the Court dismiss the complaint without leave to amend.

DATED this 28th day of August, 2008.

KAREN P. HEWITT
United States Attorney

TOM STAHL
Assistant United States Attorney
Chief, Civil Division

/s/ Lauren Castaldi
LAUREN M. CASTALDI
Trial Attorneys, Tax Division
U.S. Department of Justice

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of August, 2008, I mailed by U.S. Postal Service the foregoing to the following:

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/s/ Lauren M. Castaldi
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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CLAYTON BLEHM, dba FDC INVESTMENTS, INC. Plaintiff, v. BETSY MCINTYRE, an individual; QUICKSILVER, INC., a Delaware Corporation; and DOES1-50, inclusive, Defendants.	Case No. 08-CV-1358-BTM-NLS MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT BETSY MCINTYRE'S MOTION TO DISMISS

Named Defendant Betsy McIntyre submits this brief in support of her motion to dismiss the Complaint For Damages Fraud and Conspiracy" ("complaint") filed by Plaintiff Clayton Blehm dba FDC Investments, Inc. ("Plaintiff").

INTRODUCTION

Plaintiff filed the complaint in Superior Court of the State of California for the County of San Diego, case no. 37-2008-00084761, against former Internal Revenue Service employee, Revenue Agent Elizabeth "Betsy" McIntyre, in an apparent attempt to challenge a federal tax determination. Plaintiff alleges that Betsy McIntyre, conspired with defendant Quicksilver, Inc. to somehow "shift" employment tax liabilities from DC Shoes, Inc. to the plaintiff personally. See Complaint at 6. Plaintiff also alleges that defendants McIntyre and Quicksilver, Inc. fraudulently failed to disclose an alleged settlement between the Internal Revenue Service and Quicksilver, Inc. regarding certain employment tax liabilities. See id. at 6. Additionally, Plaintiff alleges that defendants McIntyre and Quicksilver, Inc. defrauded Plaintiff of his share of the corporation, DC Shoes, Inc. because Plaintiff sold his stock without knowing there were employment tax liabilities assessed against him. See id. at 8. The complaint seeks monetary and punitive damages. See id. at 14.

Plaintiff has identified himself as Clayton Blehm dba FDC Investments, Inc. The United States notes that this designation is confusing as it is unclear whether Plaintiff raises causes of action belonging to FDC Investments, Inc. as a corporation, or to Clayton Blehm as an individual, or both. For instance, as noted above, Plaintiff alleges that there was a conspiracy to make him personally liable for employment taxes of DC Shoes, Inc. See id. at 6.

On July 28, 2008, the United States on behalf of McIntyre filed a Notice of Removal, effecting the removal of the action from the Superior Court of the State of California for the County of San Diego to the federal District Court for the Southern District of California.

The United States has filed with this motion a Certification of Scope of Employment for Revenue Agent Elizabeth McIntyre, in which a duly authorized delegate of the United States Attorney for the Southern District of California has certified that McIntyre was acting within the scope of her employment in performing the acts that are the subject of this suit.

McIntyre was not served with a summons and complaint in this matter.

QUESTIONS PRESENTED

1. Whether the Court lacks personal jurisdiction due to Plaintiff's failure to properly serve Defendant McIntyre or the United States.

2. Whether the United States and not Defendant McIntyre is the proper party defendant.

3. Whether the Court lacks subject matter jurisdiction because the United States has not waived its sovereign immunity.

4. Whether the Plaintiff fails to state a claim for damages in tort.

5. Whether the Plaintiff fails to state a claim for damages under Bivens.[1]

ARGUMENT

1. The Court Lacks Personal Jurisdiction Due to Plaintiff's Failure to Properly Serve Defendant McIntyre and the United States.

As a preliminary matter, Rule 4(i) of the Federal Rules of Civil Procedure requires that service on an officer or agency of the United States be effected by the delivering a copy of the summons and complaint to the United States attorney for the district in which the action is brought, sending a copy of the summons and complaint to the United States Attorney General, and serving a copy on the federal employee. As a matter of record, the plaintiff has not served Defendant McIntyre and has failed to serve a copy of the summons and complaint on the Attorney General. Lack of service is a reason to dismiss this action. Fed. R. Civ. P. 12(b)(5).

2. The United States Is the Proper Party Defendant in This Action.

A suit against an IRS employee acting in his or her official capacity is a suit against the government. Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir.1985) (citing United States v. Shaw, 309 U.S. 495, 500-01 (1940)); accord Atkinson v. O'Neill, 867 F.2d 589, 590 (10th Cir. 1989) ("When an action is one against named individual defendants, but the acts complained of consist of actions taken by defendants in their official capacity as agents of the United States, the action is in fact one against the United States.").

In Malone v. Bowdoin, 369 U.S. 643, 647 (1962), the Supreme Court recognized two exceptions to the general rule that suits against federal employees for actions taken in their official capacities are essentially suits against the United States: (1) the action by the officers is beyond their statutory powers, and (2) even though the action is within the scope of authority, the powers, themselves, or the manner in which they are exercised are constitutionally void. Plaintiff fails to meet either of the two exceptions to the general rule of Malone v. Bowdoin. First, while Plaintiff alleges that Defendant McIntyre acted outside of her official capacities as an IRS agent, none of the activities described are beyond McIntyre's official duties. Plaintiff alleges that McIntyre incorrectly determined his tax liabilities and corresponding civil penalties. However, these actions are within a Revenue Agent's official capacity. Stankevitz v. Internal Revenue Service, 640 F.2d 205, 206 (9th Cir. 1981) ("[Revenue Agents] were 'responsible for the decision to initiate or continue a proceeding subject to agency adjudication'. . ."). Thus, while the complaint purports to sue Revenue Agent Elizabeth McIntyre as an individual rather than as a federal employee, it alleges nothing to establish that she acted outside the scope of her employment.

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[1] Bivens v. Six Unknown Named Agents for the Federal Bureau of Investigation, 403 U.S. 388 (1971).

The second exception discussed in Malone v. Bowdoin, whether the manner in which Defendant McIntyre exercised her authority was constitutionally void, is not present either. In his complaint, Plaintiff does not allege any constitutional violations by McIntyre. As there are no exceptions that apply in this case, the Court is respectfully requested to determine that this suit in its entirety is actually against the United States and not the individual defendant. Gilbert, 756 F.2d at 1458.

Further, even if this action is initially construed as an action against Ms. McIntyre in her individual capacity, the United States should be substituted as the sole defendant for the former Revenue Agent with respect to the claims asserted in the complaint (fraud and conspiracy) because at all times Defendant McIntyre was acting within the scope of her employment. See Stankevitz, 640 F.2d at 206. Pursuant to the Westfall Act, 28 U.S.C. 2679(d)(1), "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim [for negligent or wrongful conduct] in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant." A certification by a delegate of the Attorney General made pursuant to 28 U.S.C.

2679(d)(1) is prima facie evidence that the Government employees named in the plaintiff's suit acted within the scope of their employment and that the United States is to be substituted as the party defendant. Billings v. United States, 57 F.3d 797, 800 (9th Cir. 1995); accord Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995). The United States has filed with this motion a Certification of Scope of Employment for Revenue Agent Elizabeth McIntyre, in which a duly authorized delegate of the United States Attorney[2] certifies that McIntyre was acting within the scope of her employment in investigating Plaintiff’s tax liabilities and therefore, the United States should be substituted as the party defendant.

2. The United States Has Not Waived its Sovereign Immunity and Therefore Plaintiff’s Claims Should Be Dismissed for Lack of Subject Matter Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(1).

When a defendant challenges the veracity of the jurisdictional facts underlying a plaintiff's complaint, “[n]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.” Thornhill Pub. v. General Tel. & Elec. Corp., 594 F.2d 730, 733-35 (9th Cir. 1979). The Court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in the plaintiff's complaint. See Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). Moreover, the plaintiff bears the burden of establishing subject matter jurisdiction. Tosco Corp. v. Communities for a Better Env't, 236 F.3d 495, 499 (9th Cir. 2001). If a plaintiff cannot establish federal jurisdiction, then the court must dismiss the action. Id.

It is well settled that the United States, as sovereign, may not be sued without its consent, and that the terms of its consent define the court's jurisdiction. United States v. Dalm, 494 U.S. 596, 608 (1990); United States v. Sherwood, 312 U.S. 584 (1941). Consequently, no suit may be maintained against the sovereign unless the suit is brought in exact compliance with the terms of the statute under which the sovereign has consented to be sued. Sherwood, 312 U.S. at 590; Soriano v. United States, 352 U.S. 270, 276 (1957); Gilbert, 756 F.2d at 1458.

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[2] “The appropriate Federal agency shall submit a report to the United States Attorney for the district embracing the place where the civil action or proceeding is brought fully addressing whether the person was acting as a covered person at the time of the incident out of which the suit arose . . .” See 28 C.F.R. § 15.3.

A plaintiff bears the burden of establishing both jurisdiction and a waiver of sovereign immunity. See McNutt v. General Motors Accept. Corp., 298 U.S. 178, 188 (1936); Ohio National Life Ins. Co. v. United States, 922 F.2d 320 (6th Cir. 1990). Plaintiff has failed to allege an applicable waiver of sovereign immunity and as such the Court should dismiss his claims for lack of subject matter jurisdiction.

The fact that Plaintiff alleges that he is bringing suit against Ms. McIntyre individually, does not preclude the application of the doctrine of sovereign immunity. So long as any judgment would operate against a defendant in his official capacity, the suit is considered to be one against the United States. E.g., Land v. Dollar, 330 U.S. 731, 738 (1947); Gilbert, 756 F.2d at 1458. All of the activities Plaintiff describes in his complaint are recognized activities of an Internal Revenue Service revenue agent. One court succinctly explains, "[i]t is the function of the revenue agents to make a complete audit and to gather the necessary information to enable them and their superiors to determine whether or not the return is correct and whether or not a tax is owed by the taxpayer." Riley v. McGarry, 248 F.Supp 545, 550 (D.C. Mass. 1966). Federal tax determinations are authorized by federal law. 26 U.S.C. §6201. Furthermore, assessment of a civil fraud penalty is permitted pursuant to 26 U.S.C. §6663. This activity is within the scope of IRS activity. Plaintiff apparently disagrees with the determinations and conclusions purportedly reached by a revenue agent employed by the Internal Revenue Service. A finding by this Court that the tax assessments are invalid or improper is a finding against the United States. Plaintiff's suit is properly addressed as one against the United States. The Plaintiff fails to meet his burden to show that sovereign immunity has been waived, thereby defeating jurisdiction.

Any consideration of other potential jurisdictional grounds also shows that each is inapplicable.[3] 28 U.S.C. § 1346(a)(1) provides a district court with jurisdiction over civil actions against the United

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[3] To the extent that Plaintiff is alleging damages related to the collection of his tax liabilities, his sole form of relief is a claim brought pursuant to 26 U.S.C. § 7433. However, in order to proceed under § 7433, Plaintiff first would have needed to exhaust his administrative remedies as required by 26 U.S.C. § 7433(d). Plaintiff has made no allegation that he has exhausted his administrative remedies and therefore the Court lacks subject matter jurisdiction to hear the taxpayer's claims related to improper tax collection. See Conforte v. United States, 979 F.2d 1375, 1377 (9th Cir. 1992). Furthermore, he would need to state which specific sections of the Internal Revenue Code were violated in the collection of tax liabilities. Plaintiff has alleged no specific violations of the Internal Revenue Code.

States for the recovery of internal revenue taxes erroneously or illegally assessed or collected. Plaintiff appears to allege in his complaint that McIntyre's basis for assessing the taxes and penalties against him were improper. See Complaint at 4. Nevertheless, as a prerequisite to jurisdiction under section 1346(a)(1), the taxpayer must (1) make full payment of taxes assessed, (2) claim a refund, and (3) if the claim is denied, file a tax suit pursuant to 26 U.S.C. § 6532(a)(1). See United States v. Dalm, 494 U.S. 596, 600-02 (1990). Plaintiff has not alleged that he has complied with administrative requirements necessary to maintain a suit in district court. Without first filing an administrative claim and paying his tax liabilities, a district court lacks jurisdiction to hear the taxpayer's claims. See Conforte v. United States, 979 F.2d 1375, 1377 (9th Cir. 1992).[4]

3. Plaintiff's Claims Should Be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(6) for Failure to State a Claim upon Which Relief May Be Granted as Plaintiff Has No Claim for Damages in Tort.

In addition, Plaintiff's claims should be dismissed for a failure to state a claim upon which relief may be granted. In evaluating a motion to dismiss made pursuant to Fed. R. Civ. P. 12(b)(6), the Court must accept all material allegations in the complaint as true and construe them in the light most favorable to the plaintiff. Barron v. Reich, 13 F.3d 1370, 1374 (9th Cir. 1994); Klarfield v. United States, 944 F.2d 583, 585 (9th Cir. 1991), reh'g en banc denied, 962 F.2d 866 (9th Cir. 1992). Only if the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief" is dismissal under Fed. R. Civ. P. 12(b)(6) proper. Id. (quoting Gibson v. United States, 781 F.2d 1334, 1337 (9th Cir. 1986), cert. denied, 479 U.S. 1054 (1987)).

Except in very limited instances, neither the United States nor the federal officers are subject to suit on torts occurring during tax determination or collection. With respect to tort claims against employees acting on behalf of the United States, the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq. (the "FTCA") is "the exclusive remedy for the [tort] claimant, thus precluding any other action or civil suit against the Federal employee or his estate based upon the same conduct." H.R. Rep. No. 100700, 100th Cong., 2d Sess. 2 (1988); 28 U.S.C. §2679(b)(1). However, Plaintiff cannot sue the government or its employees under the FTCA with respect to a tax determination. 28 U.S.C. § 2680(c) provides that the waiver of sovereign immunity in the FTCA does not extend to any "claim arising in respect of the assessment or collection of any tax..." This language is broad enough to encompass any activities of an IRS officer even remotely related to his or her official duties. Morris v. United States, 521 F.2d 872, 874 (9th Cir. 1975); Hutchinson v. United States, 677 F.2d 1322, 1327 (9th Cir. 1982); Soghomonian v. United States, 82 F.Supp.2d 1134, 1143 (E.D. Cal.1999). It is beyond question that investigating and assessing an individual's tax liabilities constitute a tax determination. Even if this were not the case, to be allowed under the FTCA, the complaint must allege the filing of an administrative claim for damages, which is a prerequisite to any waiver of sovereign immunity under 28 U.S.C. § 2675(a). Mark Crisp Neil v. United States, 508 U.S. 106 (1993); Dunn & Black, P.S. v. United States, 492 F.3d 1084, 1088-89 (9th Cir. 2007).

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[4] Although not necessary to a resolution of the government's motion, Plaintiff has consented to the assessment and collection of taxes against him for tax years 1998, 1999, and 2000. (See Declaration of Lauren Castaldi, Exhibit A attached thereto). With respect to the fraud penalties assessed against him, Plaintiff filed a petition in the United States Tax Court to dispute those penalties, but then agreed to the penalties by way of a stipulated decision, which was entered by the United States Tax Court in April 2007. (See Declaration of Lauren Castaldi, Exhibit B attached thereto).

Plaintiff has made no allegation that he has pursued any administrative remedies, and therefore his complaint fails to allege a waiver of sovereign immunity. Without this waiver, the United States cannot be sued under the FTCA for allegedly negligent or wrongful activities of a Revenue Agent engaged in a tax determination. The complaint fails to state a claim with respect to the FTCA, which is the exclusive remedy with respect to the alleged tortious actions of the United States and its employees.

4. Plaintiff's Claims Should Be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(6) for Failure to State a Claim upon Which Relief May Be Granted as Plaintiff Has No Claim for Damages under Bivens.

To the extent that Plaintiff's complaint can be construed to allege constitutional violation, it fails to allege a viable claim under Bivens v. Six Unknown Named Agents for the Federal Bureau of Investigation, 403 U.S. 388 (1971). Plaintiff does not allege the violation of any constitutional right, which precludes his ability to bring suit against a federal official as an individual. See Ting v. United States, 927 F.2d 1504, 1513 (9th Cir. 1991). Moreover, Bivens relief is not available for alleged constitutional violations by IRS officials involved in the process of assessing or collection taxes. See Adams v. Johnson, 355 F.3d 1179, 1186 (9th Cir. 2004).

CONCLUSION

The federal officer Defendant Betsy McIntyre was acting within the scope of her employment and the United States should be substituted as the party-defendant with respect to any claim (fraud and conspiracy) in the complaint. The remaining allegations of the complaint fail to identify an applicable waiver of sovereign immunity, which denies the Court with subject matter jurisdiction to hear Plaintiff's claims. Furthermore, Plaintiff fails to state a claim for which relief may be granted. Finally, McIntyre and the United States have not been properly served. For the foregoing reasons, this Court is requested to enter findings and recommendations to dismiss Plaintiff's complaint with prejudice.

DATED this 28th day of August, 2008.

KAREN P. HEWITT
United States Attorney

TOM STAHL
Assistant United States Attorney
Chief, Civil Division

/s/ Lauren Castaldi
LAUREN M. CASTALDI
Trial Attorneys, Tax Division
U.S. Department of Justice

Attorneys for the United States of America

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I HEREBY CERTIFY that on this 28th day of August, 2008, I mailed by U.S. Postal Service the foregoing to the following:

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I, Lauren Castaldi, pursuant to 28 U.S.C. § 1746, hereby declare that:

1. I am an attorney with the United States Department of Justice, Tax Division located at Washington, D.C. I have been assigned to the above-captioned matter and am in possession of the Department of Justice files concerning this matter. I have reviewed those files in my possession in

making the representations below.

2. Attached hereto as Exhibit A are copies of the Forms 870 provided to me by the Internal Revenue Service signed by Plaintiff agreeing to the assessment of deficiencies for the tax years 1998, 1999, and 2000.

3. Attached hereto as Exhibit B is a copy of a Decision of the Tax Court, dated April 24, 2007, in the case of Clayton D. Blehm v. Commissioner of Internal Revenue (Docket no. 4032-06).

Executed this 28th day of August, 2008

/s/ Lauren Castaldi
LAUREN M. CASTALDI
Trial Attorney, Tax Division
U.S. Department of Justice

KAREN P. HEWITT
United States Attorney

TOM STAHL, California State Bar No. 78291
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Attorneys for the United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CLAYTON BLEHM, dba FDC INVESTMENTS, INC. Plaintiff, v. BETSY MCINTYRE, an individual; QUICKSILVER, INC., a Delaware Corporation; and DOES 1-50, inclusive, Defendants.	Case No. 08-CV-1358-BTM-NLS **Exhibit List to Declaration of Lauren Castaldi**

1. Exhibit A - Forms 870 signed by Clayton Blehm agreeing to the assessment of deficiencies for the tax years 1998, 1999, and 2000.

2. Exhibit B - Decision of the Tax Court, dated April 24, 2007.

EXHIBIT

A

Form 870 (Rev. March 1992)

Department of the Treasury—Internal Revenue Service

Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment

Date received by Internal Revenue Service

Names and address of taxpayers (*Number, street, city or town, State, ZIP code*)

Clayton D Blehm
[redacted]
Vista, CA [redacted]

Social security or employer identification number

[redacted]-0415

Increase (Decrease) in Tax and Penalties

Tax year ended	Tax	Penalties			
12/31/1998	242,507.00				
12/31/1999	237,402.00				

INTERNAL REVENUE SERVICE RECEIVED
FEB 07 2005
SBSE-COMPLIANCE-AREA 14 SAN DIEGO, CA

(For instructions, see back of form)

Consent to Assessment and Collection

I consent to the immediate assessment and collection of any deficiencies *(increase in tax and penalties)* and accept any overassessment *(decrease in tax and penalties)* shown above, plus any interest provided by law. I understand that by signing this waiver, I will not be able to contest these years in the United States Tax Court, unless additional deficiencies are determined for these years.

YOUR SIGNATURE HERE	Clayton D. Blehm	Date 1/27/05
SPOUSE'S SIGNATURE		Date
TAXPAYER'S REPRESENTATIVE HERE		Date
CORPORATE NAME		
CORPORATE OFFICER(S) SIGN HERE	Title	Date
	Title	Date

Catalog Number 16894U Form 870 (Rev. 3-1992)

Agreed AGREED

Form 4549A — Department of the Treasury - Internal Revenue Service

Income Tax Examination Changes

Page [illegible] of [illegible]

Name and Address of Taxpayer	SS or EI Number	Return Form No:
Clayton D Stein [redacted] Vista CA [redacted]	[redacted]-[illegible]	[illegible]
	Person with whom examination changes were discussed	Name and Title: J. Stephen Hawkins

1 Adjustments to Income	Period End [illegible]	Period End	Period End
a SE AGI Adjustment	[illegible]		
b Itemized Deductions	34,4[illegible].00		
c Interest Income	[illegible]		
d. Wages, Salaries and Tips, etc	550,734.74		
e			
f.			
g			
h.			
i.			
j.			
k.			
l.			
m.			
n.			
o.			
p.			
2 Total Adjustments	[illegible]		
3. Taxable Income Per Return or as Previously Adjusted	[illegible]		
4. Corrected Taxable Income	678,306.00		
Tax Method	TAX RATE		
Filing Status	Married Separate		
5. Tax	255,534.00		
6. Additional Taxes / Alternative Minimum Tax			
7. Corrected Tax Liability	[illegible]		
8 Less Credits a. Foreign Tax Credit	[illegible]		
b.			
c.			
d.			
9. Balance (Line 7 less total of lines 8a through 8d)	[illegible]		
10. Plus Other Taxes a. Self Employment Tax	[illegible]		
b.			
c.			
d.			
11. Total Corrected Tax Liability (Line 9 plus line 10a - 10d)	[illegible]		
12. Total Tax Shown on Return or as Previously Adjusted	[illegible]		
13 Adjustments to: a Special Fuels Credit			
b			
c			
14 Deficiency-Increase in Tax or (Overassessment Decrease in Tax) (Line 11 less 12 adjusted by 13)	[illegible]		
15. Adjustments to Prepayment Credits			
16 Balance Due or (Overpayment) (Line 14 adjusted by Line 15) (Excluding interest and penalties)	[illegible]		

The Internal Revenue Service has agreements with State tax agencies under which information about Federal tax, including increases or decreases, is exchanged with the States. If this change affects the amount of your State income tax, you should file the State form.

You may be subject to backup withholding if you underreport your interest, dividend, or patronage dividend income and do not pay the required tax. The IRS may order backup withholding at 31 percent after four notices have been issued to you over a 120 day period and the tax has been assessed and remains unpaid.

RGS Version [illegible]

Form 4549A [illegible]

Agreed

Form 4549A — Department of the Treasury - Internal Revenue Service

Income Tax Examination Changes

Page 2 of 2

Name and Address of Taxpayer	SS or EI Number	Return Form No:
Clayton D Blehm	[redacted]-[illegible]	1040

17. Penalties	Period End [illegible]	Period End	Period End
a.			
b			
c.			
d.			
e.			
f.			
g.			
h.			
i.			
j.			
k			
l			
m.			
n			
18. Total Penalties			
Underpayment attributable to negligence: (1981-1987) A tax addition of 50 percent of the interest due on underpayment will accrue until paid or assessed			
Underpayment attributable to fraud: (1981-1987) A tax addition of 50 percent of the interest due on underpayment will accrue until paid or assessed			
Underpayment attributable Tax Motivated Transactions TMT interest will accrue and be assessed at 120% of underpayment rate in accordance with IRC 6621(c)	0.00		
19. Summary of Taxes, Penalties and Interest:			
a. Balance due or Overpayment Taxes – Line 16, Page 1	242,577.00		
b. Penalties (Line 18, Page2) computed to [illegible]			
c. Interest (IRC§ 6601)-computed to [illegible]	113,069.16		
d. TMT Interest – computed [illegible] on TMT underpayment	0.00		
e. Amount due or refund (sum of lines a, b, c and d)	355,646.16		

Other Information:

Interest on deficiency is computed based on the unagreed fraud penalty being sustained

Interest on penalty to be computed by the Service Center

Examiner's Signature:	Employee ID:	Office:	Date:
D. McIntyre	[illegible]	San Diego	[illegible]

RGS Version [illegible]

Form CG-4549A

Name Of Taxpayer Clayton D Blehm 01/20/2005
Identification Number [redacted]-0415 Agreed $ 20.00

1998 TAX YEAR INTEREST COMPUTATION

Interest computed to		02/19/2005
Total Tax Deficiency		$242,507.00
Plus Penalties*		
- Overvaluation	$.00	
- Substantial Understatement	$.00	
- Failure to File	$.00	
- Negligence	$.00	
- Civil Fraud	$.00	
- Accuracy Penalties	$.00	
Total Penalties		$.00
Tax Deficiency and Penalties Subject to Interest		$242,507.00

Type	Effective Dates	Days	Rate	Interest
Compound	04/15/1999--12/31/1999	260	8%	$14,219.32
Compound	01/01/2000--03/31/2000	91	8%	$5,157.02
Compound	04/01/2000--12/31/2000	275	9%	$18,319.50
Compound	01/01/2001--03/31/2001	90	9%	$6,286.93
Compound	04/01/2001--06/30/2001	91	8%	$5,770.82
Compound	07/01/2001--12/31/2001	184	7%	$10,496.30
Compound	01/01/2002--12/31/2002	365	6%	$18,719.86
Compound	01/01/2003--09/30/2003	273	5%	$12,249.13
Compound	10/01/2003--12/31/2003	92	4%	$3,381.52
Compound	01/01/2004--03/31/2004	91	4%	$3,369.19
Compound	04/01/2004--06/30/2004	91	5%	$4,258.83
Compound	07/01/2004--09/30/2004	92	4%	$3,483.49
Compound	10/01/2004--12/31/2004	92	5%	$4,403.84
Compound	01/01/2005--02/19/2005	50	5%	$2,423.35

Total Interest	$112,539.10
Total Underpayment	$242,507.00
Total Penalties	$.00
Total Amount Due	$355,046.10

Additional interest will be charged at the current rate compounded daily. Interest is charged from the original due date of the return to a date 30 days after an agreement to the additional tax is signed, or to the date of payment, if earlier. Negligence and fraud penalties, if applicable, will also continue to be charged. Generally, if notice and demand is made for payment of any amount, and that amount is paid within 21 days after the date of the notice and demand, interest on the amount paid will not be charged after the date of the notice and demand. Since additional tax is due, you may want to pay it now and limit the interest and penalty charges.

* Interest on penalties became effective 7/19/1984 (1/1/1989 for negligence and fraud) and is computed from the due date of the return unless a valid extension was filed.

Name Of Taxpayer Clayton D Blehm
Identification Number [redacted] 0415 Total
12/07/2004
5 20 00

1998 - SCHEDULE A - ITEMIZED DEDUCTIONS

	PER RETURN	PER EXAM	ADJUSTMENT
1. Medical, dental and insurance premiums	0.00	0.00	0.00
2. 7.50% of Adjusted Gross Income	13,262.00	54,071.00	
3. Net Medical and Dental Expense	0.00	0.00	0.00
4. Taxes	15,166.00	18,109.00	(2,943.00)
5. Home Interest Expense	32,361.00	32,361.00	0.00
6. Investment Interest	11,000.00	11,000.00	0.00
7. Other Interest Expense	0.00	0.00	0.00
8. Total Interest Expense	43,361.00	43,361.00	0.00
9. Contributions	21,860.00	636.00	21,224.00
10. Casualty and theft Losses	0.00	0.00	0.00
11. Miscellaneous deductions subject to AGI limit	0.00	0.00	0.00
12. 2.00% of Adjusted Gross Income	3,537.00	14,419.00	
13. Excess Miscellaneous deductions	0.00	0.00	0.00
14. Other Miscellaneous deductions	0.00	0.00	0.00
15. Total itemized deductions (Sum of Lines 3,4,8, 9,10,11,14, and 15 less any applicable limitation)	76,950.00	42,345.00	34,605.00

ITEMIZED DEDUCTIONS WORKSHEET - PER EXAM

A.	Total of lines 3, 4, 8, 9, 10, 11, 14, and 15	62,106.00
B.	Total of lines 3, 6, 10, (plus any gambling losses included on line 15)	11,000.00
C.	Line A less Line B	51,106.00
D.	Multiply the amount on line C by 80%	40,885.00
E.	Adjusted Gross Income from Form 1040	720,941.00
F.	Itemized Deduction Limitation	62,250.00
G.	Line E less Line F	658,691.00
H.	Multiply the amount on Line G by 3%	19,761.00
I.	Enter the smaller of Line D or Line H	19,761.00
J.	Total Itemized Deductions (entered on line 15 above)	42,345.00

Name of Taxpayer:	Clayton D Blehm		12/07/2004
Identification Number	[redacted]-0415	Total	$.20.00

1998 - SCHEDULE SE - COMPUTATION OF SELF-EMPLOYMENT TAX

Primary

Clayton D Blehm 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

1. Self-employment income	550,734.74
2. Multiply line 1 by 92.35%	508,603.53
3. Farm Optional Method Income	0.00
4. Non Farm Optional Method Income	0.00
5. Earnings subject to self-employment tax (sum of 2, 3, 4)	508,603.53
6. Maximum earnings subject to social security	68,400.00
7. Social Security wages and tips from W-2	150,000.00
8. Unreported tips from Form 4137	0.00
9. Sum of lines 7 and 8	150,000.00
10. Line 6 less line 9	0.00
11. Multiply the smaller of line 5 or 10 by 12.40%	0.00
12. Multiply line 5 by 2.90%	14,749.50
13. Self-Employment Tax (sum of lines 11 and 12)	14,749.50

Secondary

1. Self-employment income	0.00
2. Multiply line 1 by 92.35%	0.00
3. Farm Optional Method Income	0.00
4. Non Farm Optional Method Income	0.00
5. Earnings subject to self-employment tax (sum of 2, 3, 4)	0.00
6. Maximum earnings subject to social security	68,400.00
7. Social Security wages and tips from W-2	0.00
8. Unreported tips from Form 4137	0.00
9. Sum of lines 7 and 8	0.00
10. Line 6 less line 9	0.00
11. Multiply the smaller of line 5 or 10 by 12.40%	0.00
12. Multiply line 5 by 2.90%	0.00
13. Self-Employment Tax (sum of lines 11 and 12)	0.00

EXHIBIT

B

UNITED STATES TAX COURT

CLAYTON D. BLEHM,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 4032-06
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	

DECISION

Pursuant to the agreement of the parties in this case and for the reasons set forth in the stipulation below, it is

ORDERED AND DECIDED: That there are penalties due from petitioner for the taxable years 1998, 1999, and 2000, under the provisions of I.R.C. § 6663(a), in the amounts of $181,880.25, $253,004.25, and $404,313.75, respectively.

(Signed) Mark V. Holmes

Judge.

Entered: APR 24 2007

* * * * *

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It is hereby stipulated that without admitting fault and for economic and strategic reasons, petitioner is no longer contesting before this Court the determination made by respondent in the notice of deficiency for tax years 1998, 1999, and 2000.

It is hereby stipulated that the Court may enter the foregoing decision in this case.

DONALD L. KORB
Chief Counsel
Internal Revenue Service

[signature]
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Date: 4/12/07

Date: APR 13 2007

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Attorneys for the United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CLAYTON BLEHM, dba FDC INVESTMENTS, INC. Plaintiff, v. BETSY MCINTYRE, an individual; QUICKSILVER, INC., a Delaware Corporation; and DOES1-50, inclusive, Defendants.	Case No. 08-CV-1358-BTM-NLS **CERTIFICATION OF SCOPE OF EMPLOYMENT FOR REVENUE AGENT ELIZABETH MCINTYRE** Removed from San Diego County, California Superior Court Case No. 37-2008-00084761-CU-FR-CTL

Pursuant to 28 U.S.C. § 2679(d)(2), and by virtue of the authority vested in me by the Attorney General under 28 C.F.R., Section 15.3, I hereby certify:

1. I have read the complaint in this action and all attachments thereto.

2. On the basis of the information now available with respect to the incidents referred to in

the complaint, and attachments thereto, the individual federal defendant, former Revenue Agent Elizabeth ("Betsy") McIntyre, was acting within the scope of her employment as an employee of the United States at the time of such incidents.

KAREN P. HEWITT
United States Attorney

Dated this 12th day of August 2008

Tom Stahl
TOM STAHL
Assistant United States Attorney
Chief, Civil Division